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STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF AMICUS CURIAE OF AMERICAN GAS ASSOCIATION IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

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by his attorneys:

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May 16, 1979

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
I. The Tax Would Burden Interstate Commerce with Heavy Discriminatory Penalties Exceeding Three Billion Dollars (Commerce Clause, United States Constitution, Art. I, section 8, clause 3)	2
A. The Tax Applies to Natural Gas from the OCS	2
B. The Tax Applies to Gas Which Is in Interstate Commerce	3
C. The Financial Impact on Consumers Is Severe and Wide-Spread	3
D. Potential for Similar Taxes Is Great	4
II. The Tax Is in Direct Conflict with Federal Legislative, Executive, and Administrative Mandates (Supremacy Clause, United States Constitution, Art. VI, clause 2)	5
A. The Louisiana First Use Tax Is in Direct Conflict with Preemptive Federal Legislation	5
1. The DOE Organization Act	6
2. Natural Gas Policy Act of 1978	7
B. The Louisiana First Use Tax Is in Direct Conflict with National Energy Policy Established by the Executive Branch and Implemented Administratively	8
CONCLUSION	9

INTEREST OF AMICUS CURIAE

The American Gas Association (A.G.A.) is the national representative of the natural gas industry, with approximately 300 member companies which provide gas utility service to the American public. The membership includes thirty-four pipe line (interstate and intrastate) companies, which transport natural gas from the points of production to the service lines of local gas distribution companies, and the large majority of privately owned distribution companies, which provide natural gas to residential, commercial and industrial users. Our membership supplies natural gas service to over 160 million customers in all 50 states.

The American Gas Association has a direct interest in this proceeding. The determination of whether Louisiana's First Use Tax on natural gas is constitutional is critical to the future of adequate natural gas service to consumers served by our membership. Should the State of Louisiana possess the lawful authority to impose this tax, similar taxes will undoubtedly follow in other states. The impact of such taxation on residential, commercial, and industrial consumers would be the encouragement of the use of fuels more costly and more damaging to the environment than natural gas. In addition, this tax is in egregious violation of the Commerce and Supremacy Clauses of the Constitution, as well as the other multiple violations alleged by plaintiffs.

The establishment of this tax is further in direct violation of national energy policy, which has been recently enunciated in the clearest possible terms by Congress, the President, and administrative agencies. That national energy policy is to substitute gas for imported oil by removing major price and other regulatory restrictions on gas use. To allow a single state to impose unfair financial burdens on consumers of natural gas in other states would be contrary to the federal national energy policy.

This brief is being submitted with the consent of the parties.

ARGUMENT

The purpose of this filing is to persuade this Court to grant plaintiffs' Motion for Leave to File Complaint and to assume jurisdiction over the merits of this controversy. The Louisiana First Use Tax violates multiple provisions of the Constitution. For purposes of jurisdictional determination, two constitutional violations are most evident.[1] Thus, our argument is in two parts:

I. The Tax Would Burden Interstate Commerce With Heavy Discriminatory Penalties Exceeding Three Billion Dollars (Commerce Clause, United States Constitution, Art. I, section 8, clause 3)

II. The Tax Is In Direct Conflict With Federal Legislative, Executive, and Administrative Mandates (Supremacy Clause, United States Constitution, Art. VI, clause 2)

I. THE TAX WOULD BURDEN INTERSTATE COMMERCE WITH HEAVY DISCRIMINATORY PENALTIES EXCEEDING THREE BILLION DOLLARS (Commerce Clause, United States Constitution, Art. I, section 8, clause 3)

A. *The Tax Applies to Natural Gas From The OCS*

The State of Louisiana, effective April 1, 1979, imposes a First Use Tax[2] of seven cents per thousand cubic feet ("Mcf") upon certain "uses" of natural gas within Louisiana when the gas is not otherwise subject to a severance, production or import tax imposed by any state, territory, or the United States. The tax applies primarily to natural

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[1] A.G.A. supports each of the allegations of Constitutional violations alleged in plaintiffs' Complaint. Our brief attempts to focus on why two constitutional violations make Supreme Court consideration particularly appropriate here.

[2] First Use Tax on Natural Gas, Act No. 294, 1978 La. Sess. Law Serv. 482 (West) (to be codified as LA. REV. STAT. ANN. SS 47: 1301-1307).

gas produced on the federal Outer Continental Shelf (OCS) and transported through Louisiana to consumers in other states. Louisiana intrastate producers liable for the tax obtain credit for such liability against the Louisiana severance tax. Intrastate customers thus do not pay the tax, while interstate customers do.

B. *The Tax Applies To Gas Which Is In Interstate Commerce*

The tax is imposed on natural gas which is moving in a continuous interstate stream. Natural gas is produced from wells on the OCS and flowed to a platform facility on the OCS, where liquids (water and various liquid hydrocarbons) are separated from the gas stream. The natural gas itself may also be dehydrated. After the producer performs these functions, the pipeline purchaser takes title and possession at the point of measurement (and delivery to the interstate pipeline system) on the offshore platform. The gas stream moves in continuous flow in interstate commerce thereafter.

C. *The Financial Impact On Consumers Is Severe and Wide-spread*

Plaintiffs have alleged that the First Use Tax will be imposed on approximately 3.190 billion Mcf of natural gas entering Louisiana in interstate commerce annually (which constitutes approximately 15 percent of gross national production of natural gas), resulting in costs to interstate consumers of approximately $225 million annually. A.G.A. believes these figures to be substantially correct.

Applying the 7 cent tax to current levels of production over the next 11 years, the Louisiana First Use Tax will costs interstate consumers well above $3 billion by 1991. By that time, approximately half of the recoverable

natural gas remaining on the OCS will have been depleted, based on our best estimates of the volume of natural gas remaining on the OCS available for production. Assuming the tax remains constant, another $3 billion plus would accrue to the State of Louisiana as the remaining volumes of natural gas are gathered from the OCS.

It is particularly appropriate that this Court assume jurisdiction over this controversy in view of the heavy financial impact of the Louisiana tax on consumers from plaintiff, and other, states. Pending litigation at the trial court level would provide no ultimate relief for several years.[3] It is sound judicial policy to avert damage caused by lengthy litigation where appropriate. It is respectfully submitted that a final determination of the constitutionality of Louisiana's First Use Tax should be made as quickly as possible.

The tax will in effect be directly imposed on consumers of natural gas in more than half of the Union, i.e. twenty-nine states, but not in Louisiana, a factor which weighs heavily in favor of immediate high court jurisdiction.

D. *Potential For Similar Taxes Is Great*

The "uses" upon which the tax is imposed and which are in actuality various aspects of the continous interstate journey of natural gas from the OCS to the ultimate consumers, include sales, the mere transportation of gas to

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[3] A suit filed in Louisiana state court by the State of Louisiana, seeking a declaratory judgement that the First Use Tax is constitutional, is presently in the discovery stage: *Edwin W. Edwards* v. *Transcontinental Gas Pipe Line Corp.*, No. 216867 (19th Judicial District Court, La., filed September 22, 1978). The action filed by the Federal Energy Regulatory Commission, *Fed. Energy Regulatory Comm'n* v. *McNamara*, Civil Action No. 78-384 (M.D. La., filed Sept. 29, 1978), alleging the tax to be unconstitutional, has been stayed pending termination of the state court proceeding. FERC has appealed the staying order.

various destinations within the state, and other ascertainable actions within Louisiana.

The nature of the gas industry would allow so many opportunities for analogous state taxes, should this tax be upheld, that natural gas could be assessed a vast tax burden borne ultimately by consumers.

Measurement facilities, for example, are located in every state through which natural gas passes, which includes all fifty states and the District of Columbia. Gas is transported within each state to such measurement facilities. Sales also take place in every state.

Should the Louisiana First Use Tax be upheld, similar taxes might be imposed by any and all of these states. For instance, OCS gas transported to Massachusetts travels through eleven states en route. Some, if not all, of the "uses" taxed by Louisiana occur in each of the eleven states. The effects of such multiple taxation would be intolerable.

II. THE TAX IS IN DIRECT CONFLICT WITH FEDERAL LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE MANDATES (Supremacy Clause, United States Constitution, Art. VI, clause 2)

A. *The Louisiana First Use Tax Is In Direct Conflict With Preemptive Federal Legislation*

As local energy problems have grown into national energy crises, the need for national planning has intensified. Federal legislation over the past four decades reflects the growing national concern over energy resources, natural gas in particular, and has made these resources the object of comprehensive federal regulation.[4]

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[4] See for example: 1938—Natural Gas Act (15 U.S.C. 717 *et seq.*) (assurance of reasonable rates through regulation of transportation and sale of natural gas); 1953—Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*) (federal control over

(footnote continued)

Most recently, Congress has attempted to undo the damage caused by this country's dangerous reliance on imported oil by means of two particular pieces of legislation: the Department of Energy Organization Act and the Natural Gas Policy Act of 1978.

1. *The DOE Organization Act* (Pub. L. 95-91, Aug. 4, 1977, codified at 42 U.S.C. 7111 *et seq.*) was predicated on several Congressional findings, including (at Section 101);

> (1) the United States faces an increasing shortage of nonrenewable energy resources;
>
> (2) this energy shortage and our increasing dependence on foreign energy supplies present a serious threat to the national security of the United States and to the health, safety and welfare of its citizens;
>
> (3) a strong national energy program is needed...
>
> In Section 102, Congress outlined the goals toward which the Department of Energy (and the FERC, as a part thereof) must work, including:
>
> (9) to promote the interests of consumers through the provision of an adequate and *reliable supply of energy at the lowest reasonable costs*;... (emphasis added)
>
> (11) to provide for the cooperation of Federal, State, and local governments in the development and implementation of national energy policies and programs;

(footnote concluded)
exploration for development of removal and transportation of resources from the OCS; state taxation laws not applicable to OCS): 1974—The Federal Energy Administration Act of 1974 (Pub. L. 93-275; 88 Stat. 96) (regulation of scarce energy supplies); 1974—Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93-319; 88 Stat. 246) (provision of means to meet essential fuel needs consistent with environmental concerns).

(12) to foster and assure competition among parties engaged in the supply of energy and fuels;

Thus, the Louisiana First Use Tax is in direct conflict with the principles and purposes of the DOE Organization Act.

2. *Natural Gas Policy Act of 1978*

In 1978, Congress made a herculean legislative effort to assure for the future a reliable national supply of natural gas, while keeping prices at the lowest reasonable levels, in passage of the Natural Gas Policy Act of 1978 (92 Stat. 3350, Pub. L. No. 95-621). The Act uses a phased program of decontrol for various categories of natural gas. Price increases, set forth in a detailed scheme, were specifically designed to increase gas production while keeping gas prices for residential and commercial customers at the lowest possible level consistent with production needs.

Section 110 of the Act allows the ceiling prices of various categories of natural gas to be increased to reflect certain (i.e. severance) state taxes. Such costs would be passed through to purchasers pursuant to Section 203(a)(9). If they are not passed through, the producer must bear the burden. "Severance taxes" (which includes any tax "upon natural resource production"[5]) which were enacted after December 1, 1977, must, in order to be passed through, be equally applicable to interstate and intrastate commerce. The Louisiana First Use Tax Act would force the passthrough of its costs, despite the fact that the tax affects interstate commerce alone, as a result of the Louisiana First Use Tax on Natural Gas—Severance

[5] S. Rep. No. 95-1126, 95th Congress, 2d Session 91 (1978). Despite the instant tax being characterized as a "use" tax, a fair reading of the circumstances compels the conclusion that the NGPA definition of "severance" tax more properly applies.

Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West). The national interest behind the NGPA of 1978 is in direct conflict with the parochial interests reflected in the Louisiana statutes.

B. *The Louisiana First Use Tax Is in Direct Conflict with National Energy Policy Established by the Executive Branch and Implemented Administratively*

Since the passage of the National Energy Act, the encouragement of the use of natural gas has been a basic principle of our national policy and has been reflected in each step of the implementation of the Act[6] and in other related actions. In his Energy Message of April 5, 1979, President Carter called upon the nation's utilities and other major industrial users of oil to switch to natural gas wherever possible. The President indicated that, according to the Department of Energy, 500,000 barrels of oil per day could be displaced with natural gas beginning in 1980. The Louisiana Tax is in direct conflict with this national energy policy.

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[6] See Economic Regulatory Administration, Final Rule (10 CFR Part 508) issued under the Powerplant and Industrial Fuel Use Act of 1978, 44 *Fed. Reg.* 21230 ("Increased gas use would not only help protect the nation from the effect of any oil shortgages, but also would serve to cushion the impact of increasing world oil prices, which have a detrimental effect on the nation's balance of payments and domestic inflation rate."); FERC Docket RM79-21 (proposed rulemaking establishing protective alternate fuel prices for gas-burning industries); Speech of James Schlesinger, Secretary of Energy, before National Association of Petroleum Investment Analysts, January 9, 1979 (Natural gas should be used to displace foreign oil "wherever possible"); Letter from David J. Bardin, Administrator, Economic Regulatory Administration, to State Public Utility Commissions, January 5, 1979, encouraging shift from oil to natural gas.

It is beyond the pale of reasonable federal-state relations, especially in the modern national energy context, that the State of Louisiana can frustrate federal efforts to protect the interests of *all* states. Protracted litigation over the tax in lower courts, with application for Supreme Court review thereafter a near certainty, should not be tolerated, given our Nation's current energy crises. Final judicial pronouncement on the constitutionality of this tax, which will cost consumers 225 million dollars a year until its lawfulness is determined, should come as clearly and as quickly as possible.

CONCLUSION

For the reasons cited above, this Court should grant plaintiffs' Motion for Leave to File Complaint, and should assume jurisdiction.

Respectfully submitted,

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